ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

Nos. 18-1070 and 18-1103

CRANESVILLE BLOCK CO., INC.,

Petitioner,

– v –

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

FINAL REPLY BRIEF FOR PETITIONER

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Pursuant to Fed. R. App. P. 28, Petitioner Cranesville Block Co., Inc. ("Cranesville") files this reply in support of its petition for review of the Board's findings regarding the supervisory status of William Deming and his interference with the election.

SUMMARY OF ARGUMENT

As set forth in detail below, as well as in Appellant's principle brief, William Deming was a supervisor under Section 2(11) because he exercised independent judgment with regard to: (1) assigning significant overall duties (who would handle breakdowns and whether to prioritize work on a block truck versus a mixer) to other mechanics, (2) responsibly directing staff, and (3) effectively recommending discipline. See 29 U.S.C. § 152(11). The NLRB's attempts in its Opposition to undercut these facts fall flat given the testimony and record evidence.

Because Mr. Deming should be found to be a Section 2(11) supervisor, his admitted conduct of soliciting Union authorization cards, attending Union meetings, and threatening employees that they would all be terminated if they did not vote for the Union, is sufficient misconduct to warrant overturning an election.

ARGUMENT

Section 2(11) of the National Labor Relations Act is broader than the Board admits in its opposition. The Board cites to the legislative history of Section 2(11)

in an effort to warn the Court off from an inclusive reading – cautioning against "straw bosses, leadmen, set-up men, and other minor supervisory employees" (NLRB Opposition Brief, p. 13) – when, in fact, the legislative history of Section 2(11) demonstrates that it was drafted to protect against the *under*-inclusion of individuals in the supervisor category. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947).

Specifically, Section 2(11) was drafted to address

> "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process [namely] the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."

Id. at 3. The Senate Report cites specifically to "[t]he folly of permitting a continuation of this policy," which was "dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp.," where supervisory employees were improperly folded into the union, resulting in a drop-off of disciplinary slips issued by underground supervisors, which in turn resulted in "the accident rate in each mine [being] doubled." *Id*. at 4.

In short, although the Senate was mindful of "straw bosses," it passed Section 2(11) in an effort to curb the under-inclusion of individuals in the supervisor category. For this reason, it is well-settled that if an individual performs

even one of the functions enumerated in Section 2(11) with a degree of independent judgment, supervisory status exists. *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006).

Here, as set forth in the Petitioner's Initial Brief and addressed in more detail below, William Deming was a supervisor under Section 2(11) because he exercised independent judgment in: (1) assigning significant overall duties (who would handle breakdowns and whether to prioritize work on a block truck versus a mixer) to other mechanics, (2) responsibly directing staff, and (3) effectively recommending discipline. *See* 29 U.S.C. § 152(11). Substantial evidence does not support the Board's finding to the contrary, and therefore, the decision must be overturned.

A. William Deming Exercised Independent Judgment in Assigning Tasks to Other Mechanics

William Deming oversaw four mechanics, assigning tasks to them based on his independent judgement as to who would be the right mechanic to send for repairs on certain breakdowns and to work on other tasks within the facility, including his admission that he would independently tell employees whether to work on a mixer versus a block truck and the priority of when those tasks should be performed. (JA-30, 86, 88, 93, 109, 175, 218). As testified to by one of the mechanics at the garage, "Bill [Deming] would always let me know what was

going on . . . what I have to work on, what's most priority," and further stated that Deming was the only person with authority at the Amsterdam garage on a day-to-day basis. (JA-107, 123, 138-139).

The Board cites to *Brusco* for the proposition that an individual who "make[s] only obvious or self-evident work assignments that do not require independent judgment" cannot be a supervisor. *Brusco Tug & Barge, Inc. v. NLRB*, 696 Fed. Appx. 519, 520 (D.C. Cir. 2017). However, the case is distinguished from the facts set forth here. Indeed, the Board failed to mention that the "obvious or self-evident work assignments" in *Brusco* involved boats that were "staffed with only one deckhand and one engineer, in which case the [purported supervisor] has no option to choose between employees to perform significant tasks." *Id*. at 521. As noted above, here, Mr. Deming independently assigned four different employees with similar skills to various jobs and tasks.

The primary error in the Board's underlying decision and in the Board's contentions in its opposition brief, is conflating the training required to perform a particular task with its significance. In *Oakwood*, the Board cited "restocking shelves" as an example of a "significant overall task" under Section 2(11). *Oakwood*, 348 N.L.R.B. at 689. Similarly, here, mechanical repairs performed on a road call and/or performing repairs on a mixer or block truck certainly require more training than restocking shelves and constitute "significant overall tasks"

under Section 2(11). This is particularly true given that the assignment of work on a mixer versus a block truck is arguably the most significant duty inside the garage as this is the core of the work performed at the Cranesville facility.

The Board's attempt to minimize the value and/or difficulty of this work by stating that "little training … is needed to perform" road calls does not detract from the independent judgment required to assign them and is irrelevant to the analysis. (JA-241, 45). Road calls and work on block trucks versus mixer trucks are significant overall tasks, and by failing to recognize this, the Board's decision represents a "depart[ure] from [the Board's] precedent without [a] reasoned justification for doing so." *See Pa. State Corr. Officers Ass'n v. NLRB*, Case No. 16-328 & 16-1396, 2018 U.S. App. LEXIS 18382, *10 (D.C. Cir. July 6, 2018).

In its opposition, the Board argues that Petitioner did not contest the Board's finding of independent judgment and therefore, this argument should be waived. However, Petitioner's brief repeatedly contended that Mr. Deming "had the independent authority to assign significant job duties," "Mr. Deming assigned significant tasks and exercised independent judgment in doing so", "Mr. Deming had the independent authority with respect to three of listed powers in § 2(11)" and that "Mr. Deming had full freedom to make decisions in assigning the tasks throughout the day" (Petitioner's Initial Brief, pp. 7-8, 15-16). There should

therefore be no legitimate dispute that Petitioner objected to the Board's independent judgment finding, and the Board's waiver argument is without merit.

In sum, Petitioner was the only supervisor present at the Amsterdam location and was responsible for assigning tasks on a daily basis. (JA-107, 123, 138-139). Mr. Deming himself admitted he had responsibilities to assign tasks, stating "I probably make suggestions, you know, instead of working on that, you know, a mixer's more important than, you know, a block truck they're not using or whatever." (JA-218). Mr. Deming's own admission, combined with the testimony of four other witnesses, Mr. Tesiero, Mr. Dwyer, Mr. Augustine, and mechanic James Green, who all indicated Mr. Deming used independent judgment in assigning significant tasks (i.e., breakdowns and day-to-day tasks) to employees working under him, supports a finding of supervisory status. (JA-30-31, 53, 56, 58-61, 63, 67-70, 77, 86, 88, 93, 109, 145-146, 175). In contrast, there is not substantial evidence sufficient to support a finding to the contrary, and review should be granted.

B. William Deming Had Authority to Responsibly Direct Other Mechanics

A supervisor "engages in 'direction' if he 'has men under him' and 'decides what job shall be undertaken next or who shall do it.'" *Matson Terminals, Inc. v. NLRB*, No. 17-1148, 2018 U.S. App. LEXIS 16269, at *8 (D.C. Cir. June 8, 2018)

(quoting *Oakwood*, 248 N.L.R.B. at 691). The direction is administered "responsibly" where the supervisor has "authority to take corrective action, if necessary to ensure the direction is followed," and where the supervisor is held accountable for an employee's performance. *Matson Terminals, Inc*, 2018 U.S. App. LEXIS 16269, at *8.

The Board obscures the standard for "accountability" by equating it solely with adverse consequences. In fact, "[a]ccountability may be shown by either negative *or positive* consequences to the putative supervisor's terms and conditions of employment as a result of the putative supervisor's performance in the direction of others." *See Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Significantly, the Board does not require evidence that a positive or negative consequence in the individual's terms and conditions of employment resulted from the individual's responsible direction of employees. *See Woodman's Food Market, Inc.*, 359 NLRB No. 114 (Apr. 30, 2013) ("While there is no record evidence that the Company awarded [the supervisor] the raise solely because of his performance in directing employees and holding them accountable, such evidence is not required to establish that his performance on that factor may have an [e]ffect on his terms and conditions of employment").

Here, the record demonstrates that: (1) the mechanics followed Mr. Deming's determination of task priorities (JA-139-140, 216); (2) Mr. Deming

exercised authority to take corrective action if necessary (JA-139-140, 216); (3) Mr. Deming admitted he decided the priority of certain tasks to be performed (JA-22, 46, 59, 221); and (4) Mr. Deming enjoyed at least "a real prospect of material consequences to [his] terms and conditions of employment, either positive (e.g., a merit increase or bonus) or negative (e.g., a demotion or termination)" if the tasks he assigned either were or were not performed correctly by the mechanics, because upper management was authorized not only to reward or discipline the other mechanics, but to reward or discipline Deming as well. *Woodman's Food Market, Inc.*, 389 NLRB No. 114.

Accordingly, the fact that there was no concrete evidence that Mr. Deming was disciplined or given a poor performance rating specifically for failing to oversee mechanics is not fatal, as the prospect of such a negative or positive consequence is enough.

C. William Deming Had Authority to Effectively Recommend the Discipline of Other Mechanics

Last, Mr. Deming also had the power to effectively recommend discipline. Contrary to the Board's characterization of the law, effective recommendation of discipline does not require that those recommendations be "regularly followed." (NLRB Brief in Opposition, p. 25). All that is required is that the "asserted disciplinary authority must lead to personnel action without independent

investigation by upper management." *Beverly Health & Rehab. Servs.*, 335 NLRB 635, 669 (2001).

Here, the record demonstrates that Deming reported a mechanic's substandard performance to upper management with an accompanying recommendation that the Fleet Manager "kick his assignment [i.e., terminate him] until he listens." (JA-221). Although the mechanic was not ultimately terminated, Mr. Deming's recommendation nonetheless led to "personnel action without independent investigation by upper management" in the form of a formal warning. *Beverly Health & Rehab. Servs.*, 335 NLRB at 669; (JA-42-44, 59). Contrary to the Board's assertion, Mr. Tesiero's brief conference with others before rendering the personnel action did not rise to the level of an independent investigation. *See, e.g., DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1749 (2011) (describing an "independent investigation" in the Section 2(11) context as a review of "the employee's past performance and any prior corrective measures issued to the employee," in addition to "look[ing] at the employee's file or ask[ing] questions about the employee").

Moreover, the Board's contention that Mr. Deming had only "reportorial" disciplinary authority is misplaced. Mere reportorial authority exists only when an employee "bring[s] substandard employee performance to the employer's attention absent a recommendation for future discipline." *See Illinois Veterans Home at*

Anna LP, 323 NLRB 890, 890 (1997). Contrary to the Board's characterization, Mr. Deming's report of substandard employee performance was not "merely reportorial," because it was accompanied by a recommendation for discipline, and, as set forth in *Mountaineer Park, Inc.*, 342 NLRB 1473, 1474 (2004), the fact that an employee is free to bring infractions to a supervisor with a recommended level of discipline constitutes evidence of supervisory status, regardless of whether the recommendation is imposed. (JA-221). If Mr. Deming did not have supervisory authority, he would have no reason to provide such a recommendation.

Thus, Mr. Deming had the requisite authority to effectively recommend discipline under Section 2(11), and the Board's finding to the contrary represented a "depart[ure] from its precedent without [a] reasoned justification for doing so." *Pa. State Corr. Officers Ass'n*, 2018 U.S. App. LEXIS 18382, at *10.

CONCLUSION

For the foregoing reasons, Cranesville respectfully requests that the Court grant its petition for review of the Board's findings regarding the supervisory status of William Deming, and find that based on his supervisory status, his interference with the election warrants a rerun election.

Dated: August 14, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: August 14, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2018, I electronically filed the foregoing **FINAL PAGE PROOF REPLY BRIEF OF PETITIONER**, with the Clerk of the U.S. Court of Appeals for the District of Columbia Circuit for service on:

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